

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LUZ M. HERNANDEZ
Claimant

VS.

BEEF PRODUCTS, INC.
Respondent

AND

LIBERTY INSURANCE CORP.
Insurance Carrier

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Docket Nos. 1,052,124
& 1,052,125

ORDER

Respondent and its insurance carrier appealed the September 28, 2012, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Workers Compensation Board heard oral argument on March 6, 2013.

APPEARANCES

Conn Felix Sanchez of Kansas City, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award, and also includes the September 10, 2012, motion for extension of terminal date hearing transcript. On March 28, 2013, the parties filed a written stipulation that from August 30, 2009, through May 1, 2010, claimant received \$389.63 in temporary partial disability benefits.

At oral argument, the parties stipulated that:

1. In Docket No. 1,052,124, claimant's date of accident is July 19, 2009.

2. They were not disputing findings two through four on page nine of ALJ Fuller's Award.

3. If the Board finds that claimant is entitled to a work disability, then commencing January 22, 2011, claimant is entitled to an award based upon a 100% wage loss and a 0% task loss for a 50% work disability.

4. If the Board finds claimant's functional impairment is limited to the left upper extremity, then the parties do not dispute Dr. Terrence Pratt's opinion that claimant sustained a 2% functional impairment to the left upper extremity at the level of the shoulder and a 5% functional impairment to the left upper extremity at the level of the elbow.

ISSUES

In the September 28, 2012, Award, ALJ Fuller awarded claimant permanent partial disability benefits for a 9% whole body functional impairment and a 50% work disability.

Respondent contends claimant's award should be limited to that for the functional impairment she sustained to her left upper extremity. While respondent states claimant may have sustained a right upper extremity injury as well, it argues the greater weight of the evidence does not support that claimant sustained a whole body impairment for a neck injury.

Claimant maintains the ALJ erred when granting respondent an extension of its terminal date and claimant requests the Board strike the video evidence and testimony of Robert Seitter, who conducted surveillance on claimant. Additionally, claimant asserts respondent improperly contacted Dr. Terrence Pratt, the court-ordered independent medical examiner, before the doctor issued his medical report, which violated the ALJ's Order for Independent Medical Examination. Respondent maintains the ALJ properly granted it an extension of its terminal date and respondent did not have improper contact with Dr. Pratt. Claimant asks the Board to sanction respondent by entering an award based upon the opinions of Dr. Pedro A. Murati. In the alternative, claimant requests the Board affirm the ALJ's award.

The issues before the Board on this appeal are:

1. Did the ALJ err by extending respondent's terminal date? If so, should the surveillance recordings and testimony of Mr. Seitter be excluded from the record?

2. Did respondent have improper contact with Dr. Terrence Pratt, the court-ordered independent medical examiner? If so, should respondent be sanctioned?

3. Is claimant's functional impairment limited to the left upper extremity, or did claimant sustain a functional impairment to the right upper extremity or neck?

4. In Docket No. 1,052,125, what is claimant's alleged date of accident?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The Board adopts ALJ Fuller's first finding set out on pages three through eight of the Award, excluding the first paragraph on page three and the last paragraph beginning at the bottom of page eight and ending on page nine. The Board also adopts findings two through four set forth on page nine of the Award. In addition, the Board finds:

Claimant began working for respondent on June 23, 2009. Claimant's normal job duties were to remove bad pieces of meat from a conveyor belt as they passed by. Claimant testified she would have to push or pull the bad pieces of meat off the conveyor belt. Claimant indicated the pieces of meat varied in size and weighed approximately 15 pounds. No testimony was provided by claimant as to how many bad pieces of meat she pushed or pulled off the conveyor belt during a shift, the height of the conveyor belt, or other details of what her job entailed.

In Docket No. 1,052,124, claimant alleged a single traumatic injury to the left upper extremity that occurred on July 19, 2009. Claimant was washing the roller on a moving conveyor belt when her left arm got caught in the roller. The details of the left upper extremity injury are set forth in ALJ Fuller's Award. Claimant immediately left work after being injured and went to the emergency room. Subsequently, Drs. Bill Garcia and Terry R. Hunsberger treated claimant's left upper extremity. The details of that treatment are contained in ALJ Fuller's Award. For a period of time, claimant was placed on light duty cleaning in the bathroom, but claimant did not testify how long she was on light duty. Eventually, she returned to her normal job duties. Claimant asserts that after the left upper extremity injury she used only her right upper extremity to perform her job duties for respondent.

In Docket No. 1,052,125, claimant filed an Application for Hearing on August 19, 2010, and alleged that she injured her right arm and shoulder from compensating for the injured left shoulder. The date of accident was listed as all days worked after July 19, 2009. At her deposition, claimant testified that after returning to the belt removing bad pieces of meat, she began feeling pain between her right shoulder and neck. During the regular hearing, claimant testified the pain started in the neck and moved into the right shoulder. Claimant testified that when she has pain on the right side, it runs down to the outside of the right forearm.

Claimant last physically worked for respondent on November 2, 2010, when she fainted due to a medical condition unrelated to this claim. From November 3, 2010, through January 11, 2011, claimant was on FMLA leave for the unrelated medical

condition. Respondent considered claimant absent on January 12 through 14, 2011, and terminated claimant for absenteeism on January 21, 2011.

At the request of her attorney, on October 26, 2010, and April 19, 2011, claimant was evaluated by Dr. Pedro A. Murati. Dr. Murati's evaluations, testimony and opinions on causation, functional impairment and task loss are detailed in ALJ Fuller's Award and need not be repeated here.

On September 13, 2011, ALJ Fuller issued an Order for Independent Medical Examination (Order) appointing Dr. Terrence Pratt to perform an evaluation of claimant for rating purposes and restrictions, if any. The parties were instructed to sign a joint letter of transmittal to Dr. Pratt on a blank letterhead with claimant's medical records. Respondent was to arrange claimant's appointment with Dr. Pratt. The ALJ also stated at pages one and two of the Order:

7. The attorneys are prohibited from engaging in ex parte conversations or correspondence with the physician until the physician has issued his report. If the need rises [*sic*] to contact said physician, the contact shall be made by conference call with all attorneys of record or by correspondence signed by the attorneys of record, except as provided in Paragraph 4 above.

Dr. Pratt issued an IME report dated December 5, 2011, a copy of which was filed with the Division of Workers Compensation on December 14, 2011. Dr. Pratt testified he actually signed the report on December 6, 2011, and it was printed for the ALJ and the attorneys on December 9, 2011. In her submission letter to the ALJ and brief to the Board, claimant asserts respondent contacted Dr. Pratt by email prior to the date the IME report was issued and referenced Exhibit 8 to Dr. Pratt's deposition as the email.¹ At Dr. Pratt's deposition, claimant introduced Exhibit 7, which is an email dated December 7, 2011, from Pamela Wilson, a paralegal working for respondent's attorney, to Kathy McGinty at Dr. Pratt's office. The email states, in part: "If Dr. Pratt has signed off on his report, no need to revise. If you have any questions, please let me know. Otherwise, it's ok to issue the one he has signed. Please confirm receipt of this message."² Dr. Pratt testified that he was not contacted by either attorney in a manner inconsistent with ALJ Fuller's September 13, 2011, Order.

Dr. Pratt opined claimant was in DRE Category II and sustained a 5% whole person functional impairment for her neck and a 7% left upper extremity impairment, which was the equivalent of a 4% whole body impairment, which combined for a 9% whole body impairment. Dr. Pratt testified claimant had local symptoms with Spurling's on the left,

¹ The reference to Exhibit 8 of Dr. Pratt's deposition is incorrect, as Exhibit 8 is ALJ Fuller's September 13, 2011, Order.

² Pratt Depo., Ex. 7.

limitations in cervical movements with rotation to the left, but otherwise had good movements of her cervical region. Claimant also exhibited guarding against pain in her cervical spine, which was one of the reasons he placed claimant in DRE Category II. When Dr. Pratt pressed on claimant's neck, she indicated it hurt. There was no objective symptomatology, other than her complaint of pain, that revealed a defect or lesion in claimant's cervical spine.

With respect to claimant's upper extremities, Dr. Pratt indicated the only objective findings were a healed wound on the left forearm and crepitus involving the left shoulder with range of motion. Dr. Pratt testified there was some inconsistency between claimant's complaints of pain in the right upper extremity and the objective findings. Dr. Pratt did not have available radiographic studies to review. However, he did testify that he reviewed the medical records of Drs. Hunsberger and Neel. Dr. Pratt noted in his report and testified that claimant had inappropriate responses on examination, especially for the left upper extremity, in terms of sensory and motor function. The following testimony was elicited from Dr. Pratt:

Q. (Mr. Townsley) And regardless of that though, you still found she had inappropriate responses on the left?

A. (Dr. Pratt) For the left upper extremity.

Q. Right. And I recognize, of course, we're talking she has a healed wound on the left forearm. Aside from that, other than her subjective complaints, there isn't any objective evidence or a lesion or physical change to the body, is there?

A. Not that has been identified on a study.³

. . . .

Q. (Mr. Townsley) And the DRE Category II means that you have, what, a history of an event and then a chronology or a period of subjective complaints related to that?

A. (Dr. Pratt) That's correct.⁴

On May 10, 2012, Dr. John F. McMaster evaluated claimant at the request of respondent. Dr. McMaster diagnosed claimant with a left forearm soft tissue injury/crush mechanism, seizure disorder and symptom magnification. Dr. McMaster found claimant had no functional impairment of the right upper extremity or neck. This was based, in part, upon the fact that claimant's "[r]ange of motion of the neck was judged to be without

³ *Id.* at 39.

⁴ *Id.* at 42-43.

evidence of impairment to both active and passive movement.”⁵ Dr. McMaster noticed no guarding and noted that five other physicians tested claimant’s range of motion and found very limited, if any, discrepancy between the range of motion in claimant’s left and right upper extremities. Dr. McMaster indicated claimant’s subjective complaints exceeded the verifiable scientific medical findings identified and associated with her left forearm injury. He opined that as a result of the scar on her left forearm, claimant had a 3% whole body impairment to the skin. Dr. McMaster concluded claimant needed no permanent restrictions.

Apparently, ALJ Fuller set claimant’s terminal date as June 11, 2012, and respondent’s as July 11, 2012. On July 10, 2012, respondent filed a motion to extend its terminal date. Claimant responded by filing a pleading setting forth the reasons she opposed extending respondent’s terminal date.

At the motion hearing, respondent indicated that its motion for extension of terminal date was filed the day before the terminal date. Respondent requested an extension of its terminal date so that Robert Seitter’s and Dr. Paul S. Stein’s depositions could be included in the record. Claimant argued that respondent had ample time to schedule the depositions before the terminal dates. Respondent replied that prior to the terminal date, respondent’s attorney attempted to schedule the depositions and extend terminal dates, but received no reply from claimant’s attorney.

Mr. Seitter’s deposition was taken on August 15, 2012, and claimant objected to the deposition and all exhibits. The basis for claimant’s objection was that Mr. Seitter’s deposition was being taken after respondent’s terminal date. Additionally, claimant objected to the DVD surveillance video exhibit because it was a copy. In her submission letter to the ALJ, claimant argued the surveillance recordings should not be a part of the record. However, in her Award, ALJ Fuller did not address claimant’s objection to the extension of respondent’s terminal date.

Respondent then sent a letter dated September 7, 2012, containing its reasons for requesting an extension of terminal dates. A hearing on respondent’s motion to extend its terminal date was held on September 10, 2012. On September 11, 2012, ALJ Fuller ordered respondent’s and claimant’s terminal dates extended to September 17, 2012.

ALJ Fuller indicated that Dr. Pratt’s evaluation was the most reliable as he was an independent examiner. Consequently ALJ Fuller adopted Dr. Pratt’s opinion that claimant had a 9% whole person impairment. ALJ Fuller noted in the Award that all of the physicians who examined claimant determined that she had a whole body impairment except Dr. Stein. However, as stated above, Dr. McMaster’s whole body impairment was for a scar on claimant’s left forearm from the July 19, 2009, accident. ALJ Fuller adopted

⁵ McMaster Depo. at 31.

the opinions of Drs. Pratt and McMaster that claimant had no task loss and, therefore, found claimant had a 100% wage loss and a 0% task loss for a 50% work disability.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁶ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁷

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁸

The Board will first address the issue of whether the ALJ erred in extending respondent’s terminal date. K.S.A. 2009 Supp. 44-523(b) provides:

Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted:

(1) If the employee is being paid temporary or permanent total disability compensation;

(2) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or

⁶ K.S.A. 2009 Supp. 44-501(a).

⁷ K.S.A. 2009 Supp. 44-508(g).

⁸ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

(3) on application for good cause shown.

Respondent requested an extension for “good cause” as authorized by K.S.A. 2009 Supp. 44-523(b)(3). The extension was requested so that respondent could take the depositions of Dr. Stein and Mr. Seitter. Respondent asserts that it contacted claimant to schedule the depositions prior to its terminal date or in the alternative to voluntarily extend the terminal date, but received no response from claimant’s attorney. At the hearing on respondent’s motion to extend its terminal date, ALJ Fuller found that respondent met its burden of showing that good cause existed to extend respondent’s terminal date. The Board agrees with ALJ Fuller that there was good cause to extend respondent’s terminal date, as respondent’s attorney attempted to set depositions prior to the terminal date, but received no response from claimant’s attorney.

In *Tull*,⁹ the Kansas Court of Appeals stated:

Terminal dates as defined by and set under K.S.A. 44-523(b) can be extended by agreement of the parties or by reason of specific statutory exceptions, which include “for good cause shown.” The granting of an extension of the terminal dates for good cause shown carries a discretionary review similar to the granting or denying of a motion for a continuance. Such a ruling is discretionary and will not be disturbed on appeal unless there is a clear showing of an abuse of discretion. *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 96-97, 998 P.2d 514 (2000).

While the Board has de novo review, it does give deference to the ALJ’s finding that good cause existed to extend respondent’s terminal date. The Board does not find that ALJ Fuller abused her discretion in granting respondent’s motion to extend terminal dates. Therefore, the Board will consider the deposition of Mr. Seitter and the exhibits thereto as part of the record.

The Board will next address claimant’s request that the Board enter an award based upon the opinions of Dr. Murati as a sanction for respondent contacting Dr. Pratt that allegedly violated ALJ Fuller’s September 13, 2011, Order. Dr. Pratt’s report to the ALJ was dated December 5, 2011. Dr. Pratt testified he signed the report on December 6 and it was printed on December 9 for the ALJ and the attorneys. On December 7, 2011, a paralegal for respondent’s attorney sent an email to a member of Dr. Pratt’s staff. The email in question did not ask Dr. Pratt to alter his opinions. Dr. Pratt testified that neither attorney contacted him in a manner inconsistent with ALJ Fuller’s September 13, 2011, Order. Based upon the evidence in the record, the Board finds the email was received by Dr. Pratt’s office after the IME report was signed. Further, the Board finds that claimant failed to prove she was prejudiced by the aforementioned email.

⁹ *Tull v. Atchison Leather Products, Inc.*, 37 Kan. App. 2d 87, 99, 150 P.3d 316 (2007).

The next issue for the Board is whether claimant sustained a whole body impairment or if her functional impairment is limited to the left upper extremity. At the regular hearing, respondent disputed claimant sustained a repetitive right arm injury. In its brief to the Board, respondent alleges that claimant's functional impairment is limited to the left upper extremity.

Dr. Murati's radiological review indicated all of claimant's x-rays and her MRI were unremarkable. Dr. Murati's diagnoses of bilateral carpal tunnel syndrome, myofascial pain syndrome affecting the bilateral shoulder girdles extending to the cervical and thoracic paraspinals, left ulnar cubital syndrome, left rotator cuff tear versus strain and left medial epicondylitis are not supported by objective findings. Dr. Murati is the only physician who diagnosed claimant with many of the foregoing conditions, and in doing so relied on the subjective complaints of claimant. When Dr. Murati evaluated and rated claimant, he did not have the advantage of the bilateral EMG studies ordered by Dr. Stein, which were essentially normal. Simply put, Dr. Murati's opinions in this case are not credible.

The Board disagrees with the opinion of Dr. Pratt that claimant sustained a 5% functional impairment to the neck. When Dr. Pratt pressed on claimant's neck, she indicated it hurt. Dr. Pratt acknowledged there was no objective symptomatology, other than claimant's complaint of pain. The report of Dr. Pratt indicated he had no plain films of the cervical region to review. Additionally, Dr. Pratt testified that claimant had inappropriate responses on examination.

Drs. Stein and McMaster opined claimant had no functional impairment of the right upper extremity or neck. Dr. Stein indicated there was an element of symptom magnification on behalf of claimant. Dr. McMaster diagnosed claimant with symptom magnification. Dr. Stein indicated claimant complained of right arm pain, but made no complaints of a neck injury or any symptomatology. EMG studies of both upper extremities were essentially normal. Dr. Stein went so far as to recommend claimant undergo a psychological evaluation.

Despite being evaluated for her right arm and neck complaints by several physicians, the record does not indicate claimant received treatment for her right upper extremity or neck. Nor did claimant file an application for preliminary hearing requesting medical treatment for her right upper extremity or neck. At the May 2, 2011, preliminary hearing, claimant requested temporary total disability benefits and unauthorized medical not exceeding \$500, but did not request medical treatment for her right upper extremity or neck. Drs. Pratt, Stein and McMaster did not recommend additional medical treatment for claimant.

In summary, taking into consideration that: (1) Drs. Stein and McMaster indicated claimant magnified her symptoms; (2) the opinions of Drs. Murati and Pratt that claimant had a whole body functional impairment to the neck are based on claimant's subjective complaints only; (3) Dr. Pratt noted in his report and testified that claimant had

inappropriate responses on examination; (4) claimant has not received, nor requested, treatment for her right upper extremity and neck complaints; and (5) Drs. McMaster and Stein opined claimant had no functional impairment of the right upper extremity and neck, the Board finds that claimant did not sustain a permanent functional impairment to the right upper extremity or neck.

The Board finds that it is not necessary to determine claimant's date of accident in Docket No. 1,052,125, as claimant sustained no functional impairment from the injuries she alleged in that claim.

CONCLUSION

1. ALJ Fuller extended respondent's terminal date for good cause. Therefore, the testimony of Mr. Seitter and the exhibits to his deposition are part of the record.

2. Claimant presented insufficient evidence to show that respondent had improper contact with Dr. Terrence Pratt, the court-ordered independent medical examiner. If such improper contact occurred, claimant failed to prove she was prejudiced.

3. Claimant's functional impairment is limited to the left upper extremity. Claimant sustained a 2% functional impairment to the left upper extremity at the level of the shoulder and a 5% functional impairment to the left upper extremity at the level of the elbow. There is insufficient evidence to show claimant sustained a functional impairment to the right upper extremity or neck.

4. In Docket No. 1,052,125, claimant's alleged date of accident is moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the September 28, 2012, Award entered by ALJ Fuller as follows:

Claimant is entitled to 4.5 weeks of permanent partial disability benefits at the rate of \$420.86 per week or \$1,893.87 for a 2% permanent partial disability to the left upper extremity at the level of the shoulder, and 10.5 weeks of permanent partial disability benefits at the rate of \$420.86 per week or \$4,419.03 for a 5% permanent partial disability

¹⁰ K.S.A. 2012 Supp. 44-555c(k).

to the left upper extremity at the level of the elbow, for a total award of \$6,312.90. Respondent is given a credit for the \$389.63 in temporary partial disability payments that claimant received. Therefore, claimant is entitled to \$5,923.27, all of which is due and owing less any amounts previously paid.

The record does not contain a filed fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
snchzfelix@netscape.net

William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
wtownsley@fleeson.com; pwilson@fleeson.com

Pamela J. Fuller, Administrative Law Judge